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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON

8 JAMES S. GORDON, JR., JAMES
9 S. GORDON, JR.'S INTERNET
10 ACCESS SERVICE /
11 INTERACTIVE COMPUTER
12 SERVICE, a Sole Proprietorship,

11 Plaintiffs,

12 v.

13 SUBSCRIBERBASE HOLDINGS,
14 INC., SUBSCRIBERBASE, INC.,
15 and JOHN DOES 1-10,

15 Defendants.

NO. CV-08-5037-RHW

**ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS; GRANTING LEAVE
TO AMEND**

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17 Before the Court are Plaintiffs' Motion for Jury Demand (Ct. Rec. 2) and
18 Defendant's Motion to Dismiss (Ct. Rec. 4). A hearing was held on the motion on
19 October 14, 2008 in Richland, Washington. Plaintiff James S. Gordon, Jr.
20 participated *pro se*; Defendants were represented by Derek Linke.

21 **BACKGROUND**

22 Plaintiffs James S. Gordon, Jr. and James S. Gordon Jr.'s Internet Access
23 Service/Interactive Computer Service¹ originally filed their complaint in Franklin
24

25 ¹Under Washington law, a sole proprietorship does not have legal standing
26 to sue or be sued in its own right. *Dolby v. Worthy*, 141 Wash. App. 813 (2007).
27 No legal entity is created, and a sole proprietorship does not receive any
28 protections afforded an incorporated business. *Id.* Thus, James S. Gordon Jr.'s

**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS; GRANTING
LEAVE TO AMEND ~ 1**

1 County Superior Court on May 23, 2008. Defendants SubscriberBASE Holdings,
2 Inc., and SubscriberBASE, Inc. removed the action on July 1, 2008, citing federal
3 question jurisdiction. Plaintiffs are alleging that Defendants violated the federal
4 Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003
5 (“CAN-SPAM”), 15 U.S.C. §§ 7701, *et seq.* as well as the Washington
6 Commercial Electronic Marketing Act (“CEMA”)² and the Washington Consumer
7 Protection Act (“CPA”).³

8 Plaintiffs allege that they received unwanted e-mails that consisted of false
9 advertising from Defendants. Plaintiffs state that this occurred consistently for
10 about four years, despite Plaintiffs’ request to unsubscribe from the e-mail receiver
11 list. Plaintiff Gordon is *pro se* and considers himself a “professional plaintiff,”
12 bringing claims against companies who send out spam e-mails as a primary means
13 of employment Plaintiffs are proceeding *pro se*. Specifically, Plaintiffs allege that
14 each of the emails they received:

15 1. Intentionally misrepresents or obscures any and/or all information that
16 could be used in identifying the point of origin or transmission path thereof;

17 2. Contains header information that is materially false or materially
18 misleading;

19 3. Fails to include or contains a valid physical address in the body of the
20 Email or contains multiple addresses, none of which identify the sender clearly or
21 conspicuously;

22 4. Contains domains that intentionally use a falsely registered or cloaked
23 domain;

24 _____
25 Internet Access Service/Interactive Computer Service is not a properly-named
26 Plaintiff in this action.

27 ²Wash. Rev. Code § 19.190.010-110.

28 ³Wash. Rev. Code § 19.86.

1 5. Fails to accurately identify the actual sender in the “from” name line
2 and/or “Return Path” and/or body.

3 Additionally, Plaintiffs allege that Emails were sent to and received at the
4 Recipient Addresses subsequent to notice provided to Defendants to cease and
5 desist sending unsolicited, unwanted, unlawful, and harassing Emails.
6 (Ct. Rec. 1, Ex. 2, ¶ 13).

7 Defendants removed this case under 28 U.S.C. § 1441, alleging that this
8 Court has original jurisdiction in this case under the Controlling the Assault of
9 Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C.A. §§ 7701-07.

10 **I. Defendant’s Motion to Dismiss**

11 **A. Standard of Review**

12 The purpose of rule 12(b)(6) is to test the sufficiency of the statement of a
13 claim showing that plaintiff is entitled to relief, without forcing defendant to be
14 subjected to discovery. *Cervantes v. City of San Diego*, 5 F.3d 1273, 1276 (9th Cir.
15 1993). A motion to dismiss does not involve evaluating the substantive merits of
16 the claim. *Id.* Indeed, “the issue is not whether a plaintiff will ultimately prevail,
17 but whether the claimant is entitled to offer evidence to support the claims.” *Diaz*
18 *v. Int’l Longshore and Warehouse Union*, 474 F.3d 1202, 1205 (9th Cir. 2007)
19 (citations omitted).

20 The standard is viewed liberally in favor of plaintiffs. *Cervantes*, 5 F.3d. at
21 1275. Read in conjunction with Fed. R. Civ. P. 8(a), the complaint should not be
22 dismissed unless plaintiff fails to state an adequate “short and plain statement of
23 the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A
24 complaint need only satisfy the Rule 8(a) notice pleading standards to survive a
25 Rule 12(b)(6) dismissal. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097,
26 1104 (9th Cir. 2008) (citations omitted). The complaint need not contain detailed
27 factual allegations, but it must provide more than “a formulaic recitation of the
28 elements of a cause of action.” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 127

1 S.Ct. 1955, 1965 (2007)).

2 In ruling on a Rule 12(b)(6) motion, the court must evaluate whether, in the
3 light most favorable to the pleader, resolving all discrepancies in the favor of the
4 pleader, and drawing all reasonable inferences in favor of the pleader, the actual
5 allegations asserted raise a right to relief above the speculative level. *Id.* In short,
6 the complaint must provide “plausible” grounds for recovery on its face. *Id.*
7 Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a
8 cognizable legal theory or sufficient facts to support a cognizable legal theory.
9 *Mendonado*, 521 F.3d at 1104.

10 Moreover, Rule 12(b)(6) motions are viewed with disfavor. *Broam v.*
11 *Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). “Dismissal without leave to amend is
12 proper only in ‘extraordinary’ cases.” *Id.*

13 **B. Analysis**

14 Defendants argue that Plaintiffs lack standing to assert violations of a
15 consent decree entered into between Defendant SubscriberBASE and the State of
16 Washington. In their response, Plaintiffs indicate that they agree with Defendant’s
17 argument. Thus, this claim is dismissed with prejudice.

18 Defendants also argue Plaintiffs lack standing to assert a claim under CAN-
19 SPAM, because Plaintiff has not alleged any specific harm, or alleged that he was
20 adversely affected. Under this statute, a provider of Internet access service that is
21 adversely affected by a violation of § 7704(a)(1), 7740(b), or 7740(d), or adversely
22 affected by a pattern or practice that violates § 7704(a)(2),(3),(4), or (5), may bring
23 a civil action to obtain an injunction, or receive actual or statutory damages. 15
24 U.S.C. § 7706(g).

25 Courts that have looked at this section of the CAN-SPAM have
26 overwhelmingly required that the complaint must allege specific harms in order to
27 afford standing to the plaintiff. *See Brosnan DBA Apex ISP v. Alki Mortgage,*
28 *LLC*, 2008 WL 413732 (N.D. Cal. 2008); *ASIS Internet Servs. v. Active Response*

1 *Group*, 2008 WL 2952809 (N.D. Cal. 2008); *Ferguson v. Quinstreet, Inc.*, 2008
2 WL 3166307 (W.D. Wash. 2008); *ASIS Internet Servs. v. Imarketing*
3 *Consultants, Inc.*, 2008 WL 2095498 (N.D. Cal. 2008); *ASIS Internet Servs. v.*
4 *Optin Global, Inc.*, 2008 WL 1902217(N.D. Cal. 2008); *Gordon v. Virtumundo,*
5 *Inc.*, 2007 WL 2253296 (W.D. Wash. 2007).

6 Here, the complaint is void of any assertions of actual harm. Rather, the
7 complaint states only that the transmission of the emails caused damage to
8 Plaintiff. As such, Plaintiff's claim under CAN-SPAM must be dismissed without
9 prejudice.

10 Additionally, the Washington Commercial Electronic Marketing Act
11 ("CEMA") also requires that a provider of internet access service must be
12 adversely affected in order to bring an action to recover actual or statutory
13 damages. Wash. Rev. Code § 19.190.090. Thus, this claim must be dismissed
14 without prejudice.

15 Moreover, in order to assert a claim under the Washington Consumer
16 Protection Act, Plaintiffs must plead the five elements of the CPA claim, which
17 include (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) that
18 impacts the public interest; (4) which causes injury to the party in his business or
19 property, and (5) which injury is causally linked to the unfair or deceptive act.
20 *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778,
21 784-85 (1986). Plaintiffs' failure to allege injury and causation is fatal to
22 Plaintiffs' CPA claim, and it must be dismissed without prejudice as well.

23 The Court grants Plaintiffs leave to amend. Defendants argue that Plaintiffs'
24 CEMA and CAN-SPAM allegations are so vague and conclusory that
25 SubscriberBASE lacks a reasonable opportunity to present a defense. Defendants
26 argue that Plaintiff must allege "how, which, or how many emails violate CEMA
27 or CAN-SPAM, or when any such emails were sent."

28 The Court notes that in a similar case that was filed by Plaintiff in 2004,

**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS; GRANTING
LEAVE TO AMEND ~ 5**

1 Judge VanSickle ordered Plaintiff to provide a more definite statement identifying:
2 the number of emails at issue; the time frame during which the emails were sent;
3 the addresses and domain names that received the emails; and a brief summary of
4 the factual basis upon which the Plaintiff claims Defendant sent the emails. *See*
5 *Gordon v. Impulse Marking, Inc., et al.*, CV-04-5125-FVS (Ct. Rec. 482). The
6 Court instructs Plaintiff that this information should be included in the amended
7 complaint, either in the body of the complaint itself, or as an attachment to the
8 complaint.

9 **II. Plaintiffs' Motion for Jury Demand**

10 Plaintiffs filed a Motion for Jury Demand in which he sought leave of the
11 Court to restore the jury demand in his complaint. Plaintiff maintained that he did
12 not place the lines through the jury demand on the complaint and he did not give
13 his permission for anyone else to do so. Because the Court is granting Defendant's
14 Motion to Dismiss, it is not necessary to address this issue at this time. The Court
15 will deny Plaintiff's Motion for Jury Demand, as moot.

16 Accordingly, **IT IS HEREBY ORDERED:**

17 1. Plaintiffs' Motion for Jury Demand (Ct. Rec. 2) is **DENIED, as moot.**

18 2. Defendant's Motion to Dismiss (Ct. Rec. 4) is **GRANTED.**

19 3. Plaintiffs' claims for violations of the Washington Commercial
20 Electronic Marketing Act, Consumer Protection Act, and CAN-SPAM are
21 dismissed, without prejudice.

22 4. Plaintiffs' claim for violation of the consent degree is dismissed, with
23 prejudice.

24 5. Plaintiffs are given leave to amend their complaint. Plaintiffs shall file
25 their amended complaint within 30 days from the date of this order. Failure to do
26 so could result in this case being dismissed with prejudice.

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**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS; GRANTING
LEAVE TO AMEND ~ 6**

